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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 FCS Advisors, LLC,

4 Plaintiff,

5 v.

21 Civ. 6995 (PKC)

6 THEIA GROUP, ET AL.,

Conference

7 Defendants.
8 -----x

9 New York, N.Y.
10 November 19, 2024
10:45 a.m.

11 Before:

12 HON. P. KEVIN CASTEL,

13 District Judge

14 APPEARANCES

15 STEPTOE, LLP

Attorneys for Plaintiff

16 BY: CHARLES ANTHONY MICHAEL

17 FOLEY & LARDNER, LLP

Attorneys for Basler Turbo Conversions, L.L.C.

18 BY: ANNE BERKOWITZ SEKEL

-AND-

19 REINHART BOENER VAN DEUREN S.C.

Attorneys for Basler Turbo Conversions, L.L.C.

20 PAUL J. STOCKHAUSEN(via telephone)

21 BOIES SCHILLER FLEXNER LLP

Attorneys for CogniSphere, LLC

22 BY: MATTHEW LANE SCHWARTZ

LINDSEY RUFF

23 Also Present:

24 Robert Leeds

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1 THE COURT: Please be seated.

2 (Case called)

3 THE COURT: There's no plaintiff. That's part of the
4 problem here. There is no plaintiff. There is no defendant.
5 There's a Mr. Schwartz however.

6 MR. SCHWARTZ: Good morning, your Honor. Matthew
7 Schwartz and Lindsey Ruff for CogniSphere, and we're joined by
8 our client.

9 MS. SEKEL: Good afternoon, your Honor. Anne Sekel on
10 behalf of interested party Basler, and on the telephone, my
11 colleague Paul Stockhausen, for the Reinhart firm, also on the
12 side of Basler.

13 THE COURT: I take it the receiver did not bother to
14 appear today? They are not interested in any of this?

15 MR. SCHWARTZ: They are not interested in the sense
16 that they are not parties to this dispute. We did reach out to
17 them. Mr. Fuqua was not able to be here on short notice. We
18 did receive a declaration from the receiver in support of the
19 motion, so he certainly has a position.

20 THE COURT: Let me find out.

21 MR. SCHWARTZ: We're joined by counsel for FCS as
22 well.

23 THE COURT: Okay. So FCS is appearing. So that's the
24 Carlisle group, correct?

25 MR. MICHAEL: No, your Honor, brevet.

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1 THE COURT: What?

2 MR. SCHWARTZ: FCS is affiliated with Brevet.

3 THE COURT: Reve?

4 MR. MICHAEL: No. Brevet.

5 THE COURT: I'm sorry. Brevet. And let me ask you:

6 Is Brevet associated with LTS?

7 MR. MICHAEL: Yes.

8 THE COURT: Because we've traveled down this road
9 before. This is bringing up some recollections.

10 MR. MICHAEL: Understood.

11 THE COURT: And what is the relationship, if any,
12 between Brevet and CogniSphere?

13 MR. MICHAEL: There is none.

14 THE COURT: All right. Thank you. So let me see
15 whether I understand this. CogniSphere received an assignment
16 of a contract from LTS; is that correct?

17 MR. SCHWARTZ: Succeeded to its rights under the
18 contract, correct. It was originally a subsidiary of LTS where
19 the contractual rights were placed, and then it was spun off
20 out of LTS to an entity owned by Mr. Leeds.

21 THE COURT: And Mr. Leeds was previously associated
22 with Brevet; is that the situation? Or a Brevet company?

23 MR. SCHWARTZ: So Mr. Leeds has been, at various
24 times, an outside adviser to Brevet, as well as an outside
25 adviser to Theia. This has all been disclosed and discussed,

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1 and I think we've been careful to note this in our papers.

2 THE COURT: All right. Okay. So what happens here is
3 at some point in time before the receivership, Theia enters
4 into a contract with Basler.

5 MR. SCHWARTZ: Correct.

6 THE COURT: Then we have a receivership, which is
7 secured by an affiliate of Brevet, or Brevet—however you want
8 to pronounce it—and the receiver, who is paid and funded by
9 Brevet, then recommends to the Court that the assets be sold to
10 an affiliate of Brevet and that sale is approved. That's to
11 LTS. And your client, CogniSphere, has succeeded to the rights
12 of LTS in this will contract with Basler.

13 MR. SCHWARTZ: Correct. And only with respect to this
14 contract. Not with respect to the other --

15 THE COURT: Not with respect to the other?

16 MR. SCHWARTZ: Theia assets.

17 THE COURT: What is the word?

18 MR. SCHWARTZ: Theia, the company put into
19 receivership.

20 THE COURT: Oh, Theia's assets, not other assets.
21 This is just one asset.

22 MR. SCHWARTZ: Correct.

23 THE COURT: Okay. So how are you in a position any
24 different than someone who acquires the rights to a Ricoh
25 copier owned by Theia and comes into my court seeking to

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1 enforce the warranty against Ricoh? How are you any different?

2 MR. SCHWARTZ: The difference is we're not seeking to
3 enforce the warranty on the copiers. I think we were very
4 careful in our papers to say that. We're not asserting a
5 breach of contract. That's not before your Honor. We
6 understand that's not before your Honor. We raised this
7 originally because Basler obtained an order from the Court to
8 approve a new agreement with the receiver; a new agreement that
9 paid them potentially additional consideration that they were
10 not otherwise entitled to, and they obtained that order based
11 on representations, representations made to the receiver and to
12 the district court in a sworn declaration.

13 THE COURT: When was this order entered?

14 MR. SCHWARTZ: June 11.

15 THE COURT: If you're referring to the June 11 order,
16 how do you get off asserting that Basler obtained this order?
17 That order was presented to me on behalf of LTS, the receiver,
18 and Basler. And now you characterize it as an order obtained
19 by Basler. How do you get to that?

20 MR. SCHWARTZ: Because the impetus for the order was
21 that it resolved a motion filed by Basler. So they had filed a
22 motion against --

23 THE COURT: I am aware of that. That preceded it.

24 MR. SCHWARTZ: It did.

25 THE COURT: But you all presented it.

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1 MR. SCHWARTZ: Well, not us. We were not involved at
2 that time.

3 THE COURT: LTS did. Your predecessor in interest in
4 whose shoes you claim to stand, correct?

5 MR. SCHWARTZ: Yes. But what we did not understand at
6 the time was that the representation that had been made by
7 Basler was false.

8 THE COURT: Well, you didn't have any understanding
9 because you were a stranger at that point.

10 MR. SCHWARTZ: Correct. And that's why --

11 THE COURT: Your client was a stranger.

12 MR. SCHWARTZ: That's why we put in evidence from the
13 receiver. We put in evidence from others. Everyone understood
14 the representation to mean -- because this is exactly what it
15 said, these planes are ready for delivery, which means they are
16 airworthy.

17 THE COURT: But let's get this straight. It's not
18 your client who is misled, correct?

19 MR. SCHWARTZ: My client was not a proponent of that
20 motion, but he certainly was involved in the discussions at the
21 time.

22 THE COURT: CogniSphere?

23 MR. SCHWARTZ: CogniSphere.

24 THE COURT: Not disclosed to the Court, of course.

25 MR. SCHWARTZ: That there was someone else talking to

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1 the parties, that's right.

2 THE COURT: Right?

3 MR. SCHWARTZ: Yes, true.

4 THE COURT: Okay. So your client is not in a position
5 to say it was lied to?

6 MR. SCHWARTZ: Which is why the way we have styled
7 this application -- again, we tried to raise this in the most
8 benign way possible. We wrote a letter as soon as we found out
9 on July 1. We said, Hey, we found this out. Maybe it won't be
10 an issue because they tell us the certifications are coming
11 right away, but we just want to put a marker down. And we got
12 no response even though your Honor ordered them to respond.

13 THE COURT: Well, they had responded before my order,
14 hadn't they?

15 MR. SCHWARTZ: Yes, only to say they gave
16 the-my-cousin-Vinny response; everything this guy said was
17 nonsense. They didn't explain why it was wrong in their view.
18 It was not until we got an opposition to a full-blown motion
19 that we get for the very first time a different theory of what
20 that representation meant and that this experimental-type
21 certification qualified under the contract when no one
22 thought --

23 THE COURT: Let me ask you: The contract which you're
24 referring to, the contract with Theia --

25 MR. SCHWARTZ: Yes.

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1 THE COURT: -- is that an exhibit to the June 11
2 order?

3 MR. SCHWARTZ: I don't believe so. I believe you
4 have -- the letter agreement was an exhibit to the order, and
5 the letter agreement incorporated the APA, which in turn
6 incorporated that agreement, but it was not itself attached to
7 the order. I agree.

8 THE COURT: So you are not going to ask me to construe
9 that agreement?

10 MR. SCHWARTZ: I'm simply asking you to --

11 THE COURT: No. Am I right about that? You are not
12 here asking the Court to construe or enforce the original
13 agreement between Theia and Basler?

14 MR. SCHWARTZ: Not in that posture. I'm asking to
15 look at the representation that was made to the Court.

16 THE COURT: All right. And which representation?

17 MR. SCHWARTZ: It was the representation that Basler
18 had fully performed its contractual obligations and was
19 prepared to deliver.

20 THE COURT: And if that's not true, why isn't your
21 remedy to go to the designated forum in the contract between
22 Theia and Basler?

23 MR. SCHWARTZ: Because we're not only aggrieved by a
24 violation of the original contract. Again, the letter
25 agreement that was approved in the June 11 order provided for

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1 additional and different consideration. And so, what we, you
2 know, the nub of what we're asking for here is our client paid
3 several million dollars more than they otherwise should have.

4 THE COURT: Why shouldn't I just vacate, if you were
5 misled -- first of all, you didn't enter into the stipulation
6 and order. But if you persuade me that someone was misled into
7 entering into it, maybe the receiver was misled even though the
8 receiver is not here to claim that.

9 MR. SCHWARTZ: But, again, we have a declaration from
10 the receiver.

11 THE COURT: That's great, but my recollection is there
12 were a lot of lawyers who were working on the receivership
13 estate.

14 MR. SCHWARTZ: True.

15 THE COURT: And they certainly know how to come into
16 this courtroom when they feel like it, particularly to make a
17 fee application.

18 MR. SCHWARTZ: I understand that.

19 THE COURT: They apparently didn't feel like it.

20 MR. SCHWARTZ: All I can tell you is that we
21 communicated with the receiver directly in his capacity as a
22 witness essentially, and he was not available on such short
23 notice to be here.

24 THE COURT: The receiver himself.

25 MR. SCHWARTZ: The receiver. I did not speak to his

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1 lawyers.

2 THE COURT: What about his phalanx of lawyers?

3 MR. SCHWARTZ: By --

4 THE COURT: You don't know. All right. If you were
5 lied to, then my feeling is I should vacate this June 11, 2024,
6 stipulation and order, and send you off and pursue your
7 remedies under the contract.

8 MR. SCHWARTZ: Right, and one of -- I mean, the
9 alternative relief we asked for is to unwind the contract and
10 letter agreement.

11 THE COURT: No, I didn't say unwind the contracts and
12 letters. I said vacate the stipulation and order, which was
13 the document that you claim you were misled into entering into.

14 MR. SCHWARTZ: Right, which, I think, has the effect
15 of unwinding at least the letter agreement because the letter
16 agreement has no legal force without your Honor's approval of
17 it.

18 THE COURT: Is that correct?

19 MR. SCHWARTZ: I believe that's right.

20 THE COURT: Well, take a look at the letter agreement.
21 Is there a provision in the letter agreement that it's of no
22 force and effect if the stipulation and order is not entered
23 into?

24 MR. SCHWARTZ: I will double check that.

25 THE COURT: Why don't you do that?

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1 MR. SCHWARTZ: The whole reason why it was presented
2 to you was because it was necessary.

3 THE COURT: Why don't you double check?

4 MR. STOCKHAUSEN: Your Honor, this is Paul Stockhausen
5 on behalf of Basler. Could I comment on this issue briefly?

6 THE COURT: Go ahead, sir.

7 MR. STOCKHAUSEN: First, thank you for your
8 flexibility in allowing me to appear by phone this morning. I
9 understand that it's unusual, and I very much appreciate the
10 flexibility in allowing me to do so.

11 First of all, the --

12 THE COURT: Let me ask you a question. Ultimately do
13 you agree that this case will turn on a construction of the
14 original agreement with Theia and its reference to an
15 airworthiness certificate? Do you agree that that is what this
16 is going to turn on?

17 MR. STOCKHAUSEN: Your Honor --

18 THE COURT: It provides that the condition is that
19 they shall have received a valid FAA airworthiness certificate,
20 and you claim, what, that that term is ambiguous or
21 unambiguous?

22 MR. STOCKHAUSEN: Your Honor, I don't think it's
23 ambiguous, but I don't think we even get there.

24 THE COURT: Well, I just want to get that clear. So
25 your position is, in paragraph 8, condition on delivery, a

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1 valid FAA airworthiness certificate is not an ambiguous term,
2 right?

3 MR. STOCKHAUSEN: Right.

4 THE COURT: Okay. Mr. Schwartz, what's your position?

5 MR. SCHWARTZ: A valid FAA airworthiness
6 certificate --

7 THE COURT: This is paragraph 8 of the underlying
8 agreement. What's your position on that term as used in the
9 agreement?

10 MR. SCHWARTZ: I believe, first, that an FAA
11 airworthiness certificate means a standard FAA airworthiness
12 certificate. Second, I believe that it is undisputed that
13 Basler did not obtain standard-type FAA certificates, even
14 today, and at the time it made its representation to you, it
15 had not obtained even experimental-type certificates for all of
16 the planes.

17 THE COURT: All right. Mr. Schwartz, that doesn't
18 answer the question. We can agree that your position is that a
19 valid FAA airworthiness certificate means the certificate for
20 normal operations provided for in 21-175(a) of the CFR, Title
21 14, and we can agree that that hasn't been provided.

22 MR. SCHWARTZ: Correct.

23 THE COURT: Neither of those were my questions.

24 MR. SCHWARTZ: Your question, I thought, was how to
25 understand the contractual term.

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1 THE COURT: No.

2 MR. SCHWARTZ: Tell me again the question.

3 THE COURT: All right. The question I asked was: Do
4 you contend that the language in VIII "shall have received a
5 valid FAA airworthiness certificate" is ambiguous?

6 MR. SCHWARTZ: I think the plain meaning of that
7 language is a standard FAA airworthiness certificate, and if
8 there's any ambiguity, all of the either evidence and canons of
9 construction point to it meaning that.

10 THE COURT: All right. That's nice. Do you contend
11 it's ambiguous?

12 MR. SCHWARTZ: I believe it's not ambiguous.

13 THE COURT: Okay. So you and Basler are on the same
14 page, right? Correct?

15 MR. SCHWARTZ: We believe it is ambiguous in different
16 directions.

17 THE COURT: Of course. That's not a very uncommon
18 situation; is it, Mr. Schwartz?

19 MR. SCHWARTZ: Right. It's not uncommon at all.

20 THE COURT: All right. So you both believe it's
21 unambiguous. The significance of that being that it will
22 likely be for a judicial authority to construe that language,
23 correct?

24 MR. SCHWARTZ: Yes.

25 THE COURT: And does counsel for Basler agree with

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1 that?

2 MR. STOCKHAUSEN: If that becomes an issue between the
3 parties, yes.

4 THE COURT: All right. And is Mr. Schwartz correct
5 that as we appear today, there have been no FAA standard
6 airworthiness certificates issued for the aircraft?

7 MR. STOCKHAUSEN: Yes, your Honor. That's the subject
8 of the declaration we filed in our --

9 THE COURT: I cut you off. Let me hear what you
10 wanted to say, sir.

11 MR. STOCKHAUSEN: Thank you, your Honor. I was going
12 to point out two things. One is that the representation we're
13 talking about doesn't actually say what they keep saying it
14 says. I'll read the entire representation in quotes. This is
15 the final sentence of paragraph 8 of Mr. Varkoly's declaration
16 of March 14, 2024.

17 This is the quote: "With the exception of painting
18 one plane, as the receiver is aware, I believe that Basler has
19 fully performed all of its obligations to date." It doesn't
20 say anything about ready for delivery. It doesn't say anything
21 about full contractual performance. It says "the obligations
22 to date."

23 And if the Court remembers, the whole point, the whole
24 reason for the motion to compel is that Basler was sitting
25 there having taken things as far as they could take them, and

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1 it was waiting on the others. It was waiting on the FAA to
2 give approval to the STC modifications, and it was waiting on
3 Theia and then FCS and then later on CogniSphere to give them
4 the directions to finalize the aircraft. So it had done
5 everything it could to that point.

6 There's no representation in there about immediate
7 delivery of the aircraft, much less immediate delivery of the
8 aircraft to a standard-category airworthiness certificate. The
9 fact that there wasn't standard category, there was
10 experimental category, still an airworthiness certificate,
11 wasn't a secret. The fact that we were waiting on the STC
12 modifications wasn't a secret. These were things that are well
13 known.

14 Here is the second critical point. What CogniSphere
15 here claims it was aggrieved by is having to pay these monies
16 under the letter agreement supposedly believing that they would
17 take immediate delivery of aircraft with standard-category
18 airworthiness certificates. But Mitch Docken, the individual
19 on behalf of CogniSphere who has filed several declarations in
20 support of this motion, spoke to Mr. Varkoly on the 10th of
21 June before they made any payments under the letter agreement,
22 before the Court's order that is being talked about was
23 entered, and Mr. Varkoly specifically confirmed—and this is in
24 Mr. Varkoly's declaration filed with our response
25 brief—confirmed to Mitch Dockens at that time that there were

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1 no standard-category airworthiness certificates, that they were
2 under experimental category, that the FAA still needed to act
3 to complete the modifications to the STC before they could be
4 delivered with standard-category airworthiness certificates,
5 which Dockens had indicated they want.

6 So they were in full knowledge of these facts. They
7 didn't rely on any representations. We believe those
8 representations, limited as it was, were completely true
9 anyway. But they cannot claim that they relied on it in making
10 their payment, making the choice to exercise that option, and
11 make payments under the letter agreement. They could have
12 chosen, knowing full well those facts on June 13, three days
13 later when they chose to make that payment, knowing of the
14 facts, they could have instead chosen to allow the aircraft to
15 go to auction, which was already underway, but knowing all the
16 facts, they made their choice.

17 We don't have to get to a discussion of what the
18 contract means --

19 THE COURT: Now, tell me again, your witness is who?
20 The one who says that he communicated to a representative of—I
21 don't know—LTS? Who did he communicate it to?

22 MR. STOCKHAUSEN: Mitch --

23 THE COURT: Start again, sir.

24 Excuse me, sir. The court reporter cannot take you
25 down. Start again. And my question, just to be abundantly

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1 clear on this: Who is it who did the talking on behalf of
2 Basler, and to whom did they communicate that no airworthiness
3 certificates, standard ones, had been obtained? And when was
4 this communication?

5 MR. STOCKHAUSEN: Sure. That is in the -- just so
6 that the court reporter knows where to find this in the factual
7 record, this is in paragraph 22 of Mr. Varkoly's declaration,
8 which is ECF document 463. The specific answer to the question
9 is: The person speaking on behalf of Basler was Joel Varkoly,
10 the president, and the person hearing the information was Mitch
11 Dockens on behalf of CogniSphere.

12 THE COURT: And when was the communication?

13 MR. STOCKHAUSEN: June 10, 2024.

14 THE COURT: Okay. Thank you.

15 Mr. Schwartz, do you want to respond to that? You
16 presumably have seen this in the cited paragraph of ECF 463.

17 MR. SCHWARTZ: Sure. So let me respond to a few
18 things including that. Number one, there's no question we knew
19 before we paid the money that they did not have standard-type
20 certification. We disclosed that to you in our very first
21 letter on July 1. We said we just found this out, but we had
22 really -- we were put in between a rock and a hard place,
23 because if we didn't pay the money, they were permitted to go
24 to auction and sell it --

25 THE COURT: Well, let's just back this up. You are

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1 making a claim that you were lied to, or your predecessor in
2 interest was lied to as an inducement to enter into that which
3 became the order of June 11, 2024, correct?

4 MR. SCHWARTZ: Correct.

5 THE COURT: So now I want to find out whether you
6 dispute that this conversation took place on June 10.

7 MR. SCHWARTZ: I don't know about that specific
8 conversation, but I agree before the money was paid --

9 THE COURT: I'm asking you before the order was
10 entered. That's what has been claimed here, that it took place
11 on June 10.

12 MR. SCHWARTZ: It doesn't matter. The important thing
13 is what representations were made before the parties entered
14 into the letter agreement and presented it to your Honor for
15 approval. All of it happened before June 10. So the
16 misrepresentations that were done in connection with contract
17 formation and then to the Court in connection with getting the
18 order, they were already made.

19 THE COURT: Oh, no, no, no, sir. No, sir. No, sir.
20 No, sir. Because if it was the case that the stipulation that
21 was on the Court's desk was premised upon a misrepresentation
22 which you learned before it was entered as an order of the
23 Court, it's not too late. It's not even slightly too late.

24 MR. SCHWARTZ: Well --

25 THE COURT: And if you got in touch with me and I

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1 entered the order, my goodness, I would vacate it if you had a
2 valid basis to claim a misrepresentation.

3 MR. SCHWARTZ: That's what we did. So we did that on
4 July 1. I appreciate that was not June 10 or June 11.

5 THE COURT: No, but the argument is before you paid
6 the money, you knew. Before the stipulation was entered as an
7 order of the Court, you knew, and your comeback is a very
8 surprising one. Your comeback is, well, we had signed the
9 letter agreements. And I asked you before whether those letter
10 agreements remain enforceable, and if I understood you
11 correctly, no, they were dependent on there being an order.
12 And if there was no order, those agreements are not valid. Is
13 that your position?

14 MR. SCHWARTZ: That's true. And I've looked at it,
15 and that's certainly true.

16 THE COURT: And there's a provision in there to that
17 effect?

18 MR. SCHWARTZ: There's -- there are things that the
19 letter agreement does that can only be done with Court
20 approval, which was the reason why Court approval for the
21 letter agreement was sought. So the letter agreement cannot be
22 effectuated without Court approval. It required, for example,
23 a lift of the receivership stay for Basler to go forward with
24 an auction under the auction option under the letter agreement.

25 THE COURT: Well, that was only if there was a failure

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1 to pay.

2 MR. SCHWARTZ: Yes, but that was the structure of the
3 agreement. I'm saying the structure of the agreement, it was
4 obviously a holistically negotiated agreement, and it could not
5 have been implemented without the Court's approval.

6 THE COURT: What was the language in the agreement
7 regarding lifting the stay?

8 MR. SCHWARTZ: I'm not sure that there's language in
9 the agreement other than specifically language about the
10 resolution of Basler's then pending motion, which was also
11 resolved through the letter agreement, but the stipulation and
12 order --

13 THE COURT: I know what the stipulation and order
14 says. It says if there's a breach, they can go ahead.

15 MR. SCHWARTZ: Not a breach. It's not a breach.

16 THE COURT: A nonpayment.

17 MR. SCHWARTZ: The structure of the letter agreement
18 was there were several different options, one of which was if
19 there's nonpayment under option one or two, Basler could go to
20 auction. But there was still then option three, where LTS
21 could take it out of the auction process by paying an extra
22 fee, and that's the one that actually happened.

23 THE COURT: And now what I'm asking you is whether
24 this was in the letter agreement.

25 MR. SCHWARTZ: I don't think -- without reading every

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1 single word, there's something in the letter agreement that
2 says this agreement requires approval of the Court. It is
3 crystal clear that that's what the parties believed. Maybe
4 Mr. Michael could speak to that because he was involved in it.
5 But it was crystal clear that just like the sale -- just like
6 the sale of assets was originally an agreement between Brevet
7 and the receiver, the APA, but it was of no legal moment until
8 the Court approved it because of the receivership. This, too,
9 was of no moment until the Court approved it. And everyone --

10 THE COURT: And therefore, it becomes critically
11 important to know whether the representation that has been made
12 that is based on, I think I heard paragraph 22 of ECF 463, is
13 accurate and claimed to have taken place on June 10?

14 MR. SCHWARTZ: Well, so --

15 THE COURT: I think your client has a note to send
16 you, so why don't you talk to your client?

17 MR. SCHWARTZ: I'm sure he does.

18 (Counsel and client conferred)

19 MR. SCHWARTZ: It is true that money was paid in
20 tranches, and some of the money was paid before June 10 and
21 some of the money was paid after June 10. So to the extent --

22 THE COURT: When was the money before June 10 paid?

23 MR. SCHWARTZ: Late May.

24 THE COURT: Late May. And what did you rely on that
25 was false to make that payment?

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1 MR. SCHWARTZ: Everyone understood, including based on
2 the representations that they admit in their opposition papers
3 were made directly to the receiver; they say separate from the
4 declaration to the Court, they represented to the receiver that
5 the planes were in deliverable condition. Everyone understood
6 it. And the entire premise of their original motion for cure
7 costs was these things are ready for delivery but for the fact
8 that Theia, and then the receiver, hasn't paid us. And that --

9 THE COURT: And so you thought there were FAA
10 certificates of airworthiness?

11 MR. SCHWARTZ: Correct.

12 THE COURT: And then I'm told that certainly on
13 June 10, you knew that wasn't true.

14 MR. SCHWARTZ: I don't know exactly. That's what --

15 THE COURT: Why don't you talk to your client again?
16 Maybe you can find out.

17 MR. SCHWARTZ: He wasn't party to that conversation.

18 THE COURT: Okay.

19 MR. SCHWARTZ: We found out --

20 THE COURT: I'm sure he did his due diligence before
21 acquiring CogniSphere, no?

22 MR. SCHWARTZ: Before acquiring CogniSphere?

23 THE COURT: Didn't you tell me he was the owner of
24 CogniSphere?

25 MR. SCHWARTZ: Yes.

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1 THE COURT: Yes, before he acquired CogniSphere.

2 MR. SCHWARTZ: The diligence was understanding the
3 contractual relationships and the value of the assets. We
4 tried to --

5 THE COURT: This would relate to the value of assets,
6 right?

7 MR. SCHWARTZ: But we tried to do diligence on the
8 planes themselves, but until the money started flowing, Basler
9 wouldn't permit any of that diligence. That's why we don't
10 find out anything until after the money starts flowing in late
11 May.

12 THE COURT: Well, apparently and --

13 MR. STOCKHAUSEN: Can I comment on that topic?

14 THE COURT: -- unless you have something to contradict
15 it with, because you had this before you walked in the
16 courtroom today.

17 MR. SCHWARTZ: I agree. I'm okay assuming for
18 purposes of this conversation that on or about June 10, we
19 found out that there was no airworthiness.

20 THE COURT: Okay.

21 MR. SCHWARTZ: And I understand the position that we
22 should have run into court then, and say this was --

23 THE COURT: Yeah, I know you understand it, but what's
24 the legal effect of it?

25 MR. SCHWARTZ: I don't think anything. Because we

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1 come in here complaining about the representations that were
2 made prior to the signing of the letter agreement and to obtain
3 approval of the letter agreement. It is true, assuming this
4 conversation happened on the 10th and it came back to the
5 principals, that we could have run into court, you know, within
6 a day before you signed the order and said, Hold on, that
7 representation is not correct. But we were also being told by
8 Basler that these things were imminent.

9 That's what we wrote to you on July 1. We said, Look,
10 we're not trying to make a big deal of this, but we were told
11 that these certifications were imminent. They haven't come
12 yet. We want to just let it be known that if they don't come
13 through soon, it's a problem. And your Honor --

14 THE COURT: Mr. Schwartz, you are trying to say it's
15 not a big deal, it's imminent, et cetera, but the reality is
16 you are premising your fraud claim before me on not knowing
17 that there were no FAA standard airworthiness certificates.
18 That's what you're premising it on. So when you tell me it's
19 not a big deal, it kind of undermines your fraud claim.

20 MR. SCHWARTZ: No, no. I --

21 THE COURT: And, yeah, we might have known on June 10.
22 It doesn't sound like you're a victim of a fraud.

23 MR. SCHWARTZ: I'm not saying it's not a big deal.
24 I'm saying our application is premised upon representations
25 that were made to you and that were made to the receiver that

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1 were false, right, and those --

2 THE COURT: So stop with this business like it's no
3 biggie that we knew on June 10.

4 MR. SCHWARTZ: Okay. But at that point, we were
5 already mid-transaction. Money had flowed, and all of the
6 parties were behaving as if this letter agreement, although it
7 hadn't yet been approved, was going to be approved. So there
8 are deadlines, date deadlines not keyed off of the entry of the
9 order, but objective date deadlines in the letter agreement
10 that had to be dealt with.

11 So there were on-the-ground realities which is why my
12 client had to make a decision even though it knew prior to
13 making the last payment for sure that these standard-type
14 certifications were in place. Because if it hadn't done that,
15 the planes would have been sold at auction, and they would have
16 been sold on an as-is basis and --

17 THE COURT: Under paragraph 3 of the order, right?

18 MR. SCHWARTZ: Under the auction provision of the
19 letter.

20 THE COURT: That's where your argument falls apart,
21 Mr. Schwartz.

22 MR. SCHWARTZ: I understand --

23 THE COURT: That's where your argument falls apart.
24 Stop. Have a seat.

25 MR. SCHWARTZ: I --

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1 THE COURT: You're a very bright man. You've appeared
2 before me many times. I've been very complimentary about your
3 work before me, but this is now talking nonsense. If you knew,
4 there would have been no paragraph 3. If you had alerted the
5 Court, I certainly would have stopped on a dime before I signed
6 it. I don't know what I would have done, whether I would have
7 ultimately signed it or not, but rest assured that I would have
8 stopped on a dime if you made the assertion, There's a fraud
9 going on here. I just found out. My client just found out.
10 Mitch Dockens just found out that there are no FAA standard
11 certificates of airworthiness. There wouldn't be a paragraph 3
12 of an order because you have told me today on the record that
13 that language doesn't appear in the letter agreements. So the
14 argument sounds to me like it is full of holes.

15 MR. SCHWARTZ: Well, I'm not sure what you mean when
16 you say the language doesn't appear in the letter agreement.

17 THE COURT: Well, I asked you. I asked you the
18 question. I'll ask it again. Maybe you'll give me a different
19 answer. But did the letter agreement contain language about
20 lifting the automatic stay or the stay of any actions? I don't
21 believe so. I believe you told me, No, no, no, the letter
22 agreements didn't say that. That was paragraph 3 of the order.

23 MR. SCHWARTZ: Well --

24 THE COURT: And you told me the letter agreement
25 absolutely contemplated the order. If there was no order,

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1 there's no letter agreement.

2 MR. SCHWARTZ: The letter --

3 THE COURT: Well, then stop the presses on June 10.

4 MR. SCHWARTZ: Let me say two things. Number one,
5 Ms. Ruff helpfully points out that in paragraph 2 of the letter
6 agreement, it does expressly refer to lifting a receivership
7 stay. For what it's worth, that is in the letter agreement.

8 THE COURT: Which the letter could not do without the
9 order --

10 MR. SCHWARTZ: Agreed.

11 THE COURT: -- and you told me, and I think I'm
12 agreeing with you, the letter was premised on their being an
13 order.

14 MR. SCHWARTZ: I agree 100 percent.

15 THE COURT: If that's the case, you could have stopped
16 the train.

17 MR. SCHWARTZ: So accepting all of that, I think the
18 question is: Does the fact that we tried to be constructive
19 and not run into court and upset all of those negotiations in a
20 contract that was already going through, does that erase the
21 fact that misrepresentations were made? I think the answer is
22 no, and I think your Honor ought to be at least as upset at
23 Basler as you are at me that misrepresentations were made to
24 receiver and to the Court in connection with obtaining that
25 order. And there ought to be consequences for that, and that's

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1 really what we're here for.

2 THE COURT: Okay. Let me ask Basler's attorney: Have
3 you been paid what the June 11 order required you to be paid?

4 MR. STOCKHAUSEN: Mostly, not completely, your Honor.

5 THE COURT: What not completely?

6 MR. STOCKHAUSEN: The letter agreement specifically
7 says that after the exercise of whichever option, the payment
8 option or the cancellation option, the cancellation option is
9 what occurred, that the parties acknowledge and agree that to
10 get from there to actual delivery is going to require
11 additional services from Basler in the ordinary course, storage
12 costs, and other costs incidental to the delivery. Those costs
13 have been accruing. They total -- I think Mr. Varkoly put in
14 his declaration that as of November it was right around a
15 little shy of \$400,000, but they continue to accrue every day.
16 So those costs are outstanding and need to be paid, but other
17 than that, your Honor, I think we've been paid everything.

18 THE COURT: All right. Now, do I understand you that
19 you have some expectation that you will receive standard
20 airworthiness certificates in or about the first week of
21 December?

22 MR. STOCKHAUSEN: Your Honor, for two of the aircraft,
23 yes. The aircraft that is currently at the paint shop can't be
24 looked at by FAA DAR until it comes back from the paint shop,
25 which right now, based on the paint shop's schedule, looks to

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1 be mid-January. For two of the aircraft, first week of
2 December, and for one of the aircraft, mid-January whenever
3 it's back from the paint shop, and we can schedule the DAR.

4 THE COURT: Right.

5 MR. STOCKHAUSEN: I'd like to point something out if I
6 may, your Honor, about this question of notice. You know,
7 we've talked about fraud and misrepresentation, and we still
8 haven't gotten back to any representation to the Court about
9 standard-category airworthiness certificates. If the parties
10 truly talked past each other and had a different understanding
11 of what the term meant in the contract, as your Honor noted in
12 the beginning, that's a different question. That's a contract
13 interpretation question that would have to go before a court in
14 Winnebago County, Wisconsin, to talk about the interpretation
15 of --

16 THE COURT: Well, it's either going to be there or
17 here, I assume.

18 MR. STOCKHAUSEN: What?

19 THE COURT: It's either going to be there or here.

20 MR. STOCKHAUSEN: Yes, your Honor.

21 And one thing that's really critical is the status of
22 these aircraft; the fact that they were under experimental
23 airworthiness certificates, the fact that the STC modification
24 was applied for but pending FAA action, the fact that in all
25 other ways, they were ready to go, ready for delivery, work on

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1 them had been completed as far as it could be without the final
2 input from Theia or LTS or CogniSphere. That status was the
3 same from 2021 forward. It had been the same all along, and it
4 was not a secret.

5 LTS before CogniSphere or CogniSphere after that at
6 any time could have found out that information by calling Joe
7 Varkoly at Basler, by emailing, by asking the questions, by
8 coming and visiting, any means. And when they were
9 investigating -- LTS was investigating whether they wanted to
10 step into Theia's shoes and buy the Theia receivership assets;
11 could have asked. It was a widely known fact. There was even
12 available public records that would have reflected part of it
13 because it's an ongoing FAA proceeding. Could have asked.
14 Could have known. Didn't bother.

15 Between then and the pending motion to compel, could
16 have asked. Could have known. Didn't bother all the way up
17 until the moment they were going to make that final payment on
18 the 13th of June. They finally asked, and when they finally
19 asked, they were immediately told and there was no more
20 uncertainty. This isn't reliance on a fraud or a lie. They,
21 for whatever reason, never looked.

22 THE COURT: Well, this is asked out of total ignorance
23 on the subject. Are FAA standard certificates of airworthiness
24 matters that are knowable by somebody who has the appropriate
25 identification numbers of the aircraft?

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1 MR. STOCKHAUSEN: Yeah. You can go to the FAA's
2 website and look up any aircraft by tail number, and you can
3 obtain its entire registration status, which includes its
4 airworthiness status.

5 THE COURT: And as of May 1, what would you have found
6 if you looked on May 1? Make that April 15. What would you
7 have found out on April 15 if you had looked up the tail
8 number?

9 MR. STOCKHAUSEN: My understanding, your Honor, is you
10 would have found out the aircraft are registered to Basler
11 Turbo Conversions, and that aircraft 68 -- you know, I can't
12 remember which of the numbers it is. Two of the three aircraft
13 were under currently active experimental category airworthiness
14 certificates. The third wasn't at that time under any
15 airworthiness certificate because that was the one that was
16 waiting to be completed, which now that I say this out loud was
17 aircraft 70.

18 THE COURT: So if there's discovery in this and
19 depositions are taken, one supposes that we'll find out whether
20 LTS or CogniSphere or its owner did that --

21 MR. STOCKHAUSEN: Yes, your Honor.

22 THE COURT: -- before plunking down 12 million bucks.

23 MR. STOCKHAUSEN: It's not a secret. We would have
24 told them this information if they were confused about it at
25 any time.

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1 THE COURT: I understand. I understand.

2 Mr. Schwartz, can you say that your client—let's take
3 April—did not know as of April what could have been learned by
4 a check of the FAA website?

5 MR. SCHWARTZ: I don't know. I can ask him. I can
6 put him on the stand to see when we found out what we found
7 out. And in that connection --

8 THE COURT: No, no. I had a specific question.

9 MR. SCHWARTZ: I know --

10 THE COURT: I had a specific question.

11 MR. SCHWARTZ: I know. I'm answering it. I'm
12 answering it.

13 THE COURT: So finding out what a particular
14 individual learned and when he learned it doesn't answer the
15 question of whether in the course of due diligence someone on
16 behalf of LTS or CogniSphere, whether it was a lawyer, a
17 retained aircraft broker or otherwise, had secured this
18 information. I mean, I would find it astounding that you would
19 buy an aircraft not knowing anything about the condition of the
20 aircraft, the maintenance, the hours on the engine, any of
21 these things, or whether it had a normal certificate of
22 airworthiness.

23 Now, it will be great. If I keep this case, we'll
24 have a hearing. We'll have the testimony of the witnesses and
25 we'll have the witnesses—your witnesses—come up and take the

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1 stand and say it never occurred to me to check the FAA website
2 to see whether there was a certificate of airworthiness before
3 plunking down \$12 million. I'd be very curious to hear that
4 testimony.

5 MR. SCHWARTZ: I don't know the answer to that. I
6 don't even know if we knew the tail numbers at the time. As
7 they note in the papers, these numbers, 68, 69, 70, these are
8 arbitrary designates not tail numbers. I don't know the answer
9 to that. I also -- I may have been reading quickly, but since
10 my friend made the observation, your Honor, that there was some
11 conversation between their president and a representative of
12 CogniSphere on June 10, an important date, I looked carefully
13 at his declaration to find that and I don't see that. I may be
14 overlooking it, but what I see is a representation that between
15 late May and June 13, there were a number of conversations
16 including where that was discussed. That would be important,
17 too.

18 MR. STOCKHAUSEN: That's accurate, your Honor. The
19 specific date of June 10 is, in fact, the date that Mr. Varkoly
20 had the conversation with Mitch Dockens. Getting to the level
21 of talking about which of each of the conversations Mr. Varkoly
22 had during that period wasn't critical at the time we filed
23 that declaration a couple weeks ago. So what seemed critical
24 was that they knew the facts before the date of June 13, which
25 is when they chose to exercise the option and make the payment.

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1 We could certainly have Mr. Varkoly get on the stand or submit
2 a supplemental declaration describing that specific
3 conversation that occurred on the 10th.

4 I think what the declaration says is that he had
5 multiple conversations with multiple people for LTS between
6 May 31 and June 13 and provided all of the information that I
7 described. He, in fact, did do so. One of those conversations
8 was the conversation on the 10th of June with Mr. Dockens.

9 THE COURT: All right. Let me get to something of
10 more practical significance. I want to hear from Basler's
11 viewpoint what happens with regard to the two planes in the
12 first week of December. I don't know how this works. Is it
13 like a driver's test where you complete the driver's test and
14 they tell you passed or you failed? Does it take a week? A
15 month? Three months? When do you find out whether you get
16 standard certificates of airworthiness on the two planes?

17 MR. STOCKHAUSEN: Your Honor, my understanding, and I
18 don't have a full detailed understanding of Mr. Varkoly to lay
19 all this out for you, but my understanding of it is what the
20 DAR—it stands for designated airworthiness
21 representative—from the FAA does is -- this is in relation
22 from the application for the modification of the STC. So they
23 are coming out essentially to inspect the aircraft and confirm
24 that the condition of the aircraft is as it was represented to
25 be in the application for the modification of the STC, and they

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1 are confirming that it is so as their confirmation.

2 They look at it. It's essentially a checked box.

3 Yep, yep. It is. That's what you said. That's the system
4 that is installed. That's the one listed on the modifications
5 from the STC and described in the training materials. And that
6 upon the DAR's making inspection and confirming that it is as
7 it was said to be, at that point, they sign off. And then, the
8 standard-category airworthiness certificate issues from the
9 type certificate holder, which is standard Arrow in this case,
10 and that that's simply inputting it on the form on the internet
11 and it's done. It's not so much a piece of paper as a change
12 in status of the aircraft. So it's effectively immediate after
13 the inspection is complete. It should be the same day.

14 THE COURT: All right.

15 MR. STOCKHAUSEN: That's my understanding of it.

16 THE COURT: All right. Okay. So let me ask your view
17 of the world, and then I'm going to ask CogniSphere its view of
18 the world. Two of the planes now have standard certificates of
19 airworthiness. What happens with regard to those two planes?
20 And then, we'll talk about what happens with regard to the
21 third plane. Start with the two planes. In your view of the
22 world, what should happen?

23 MR. STOCKHAUSEN: What should happen, your Honor, we
24 believe—and this is what we've sort of been following all
25 along—is we're just following the normal course toward and

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1 through delivery under the contract. And there's a specific
2 procedure to follow for delivery that -- and there will be --
3 as soon as the parties schedule the moment of delivery, which
4 we've been waiting for to get schedule, then they come out and
5 they do, first, a ground inspection, which is essentially them
6 going through the aircraft in every detail and confirming that
7 it conforms to the agreed specifications for the aircraft. And
8 then, they do a flight, and then sign-off on that. And then,
9 they'll do a flight inspection where they will go up with the
10 instructor and take the aircraft through its paces and
11 demonstrate that in flight, in operation, it conforms to its
12 specifications. And then, there's the pilot transition
13 training that will occur as part of that.

14 That process will complete with acceptance of the
15 aircraft against the contract specifications, and assuming they
16 accept it, that it is what they understood it was supposed to
17 be, that we would then sign -- they would sign the acceptance
18 of the aircraft. We would sign the bill of sale transferring
19 ownership of, you know, title of the aircraft, and then they
20 file with the FAA and get their registration transfer. That's
21 the process under the contract. That's what we see occurring.

22 We can do it with the aircraft sequentially, you know,
23 the first two and the third one when it's available. We can do
24 them all when they are all available. We can do it in any
25 order that CogniSphere prefers. And I believe that

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1 representatives, in fact the same Mitch Dockens of CogniSphere,
2 have been in touch with Mr. Varkoly to start scheduling all of
3 that already.

4 THE COURT: All right. So it's not crystal clear to
5 me, but first order of business would be the FAA inspection of
6 the two aircraft. Then there would be some inspection process
7 by the buyer, right?

8 MR. STOCKHAUSEN: Yes, your Honor.

9 THE COURT: Okay. And then the two aircraft would be
10 eligible to be delivered to the buyer, right?

11 MR. STOCKHAUSEN: Yes.

12 THE COURT: And what's the story on the third
13 aircraft?

14 MR. STOCKHAUSEN: The story on the third aircraft,
15 your Honor, is exactly the same.

16 THE COURT: I know it's being painted. But when the
17 paint dries, what happens?

18 MR. STOCKHAUSEN: When the paint dries, it gets flown
19 back to Basler's hangar at Oshkosh, Wisconsin, and Basler will
20 do the final, you know, checks and minor assembly post-pointing
21 that is normally done. And then, the same process will occur.

22 THE COURT: And when will the paint be dry?

23 MR. STOCKHAUSEN: I don't believe we've got a firm
24 date on that, your Honor, but our understanding is mid-January.

25 THE COURT: All right. Okay. Thank you. Let me hear

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1 from Mr. Schwartz, your version of the world. What should
2 happen when, as, and if, there is an issuance of a standard
3 airworthiness certificate in or about the first or second week
4 of December?

5 MR. SCHWARTZ: So assuming all the contracts in order
6 stay in place and the standard airworthiness certificates are
7 issued, then, as my friend said, as soon as the planes
8 otherwise meet the specifications, they will be ready for
9 delivery. When they go through that sort of delivery process,
10 that will become the delivery date. I appreciate Basler
11 clarified both in their papers, in our meet-and-confer
12 yesterday, and in my friend's remarks just now, that the
13 delivery date hasn't occurred yet and will occur at some point
14 in the future when all those points happen, and then we'll take
15 delivery. The one part of it that was left out was they also
16 have charged us and intend to charge us large sums of money for
17 storing, maintaining and insuring the planes.

18 THE COURT: And you think I should adjudicate that?

19 MR. SCHWARTZ: Well, those are the cure costs.

20 THE COURT: Do you think I should adjudicate that?

21 MR. SCHWARTZ: Yes, in the following sense. The
22 incremental monies that were paid in the letter agreement, the
23 cure costs, are those costs. Those are costs that Basler --
24 this is why the misrepresentation is so important.

25 THE COURT: You are so far remote from the reason for

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1 this receivership. You're a total downstream party. My
2 analogy to the Ricoh copier warranty is not far off base.

3 MR. SCHWARTZ: Again, we're not here complaining about
4 contract terms. We're not here complaining about the diligence
5 that was done. The reason why we're before you is because an
6 order was obtained from your Honor and an agreement was
7 obtained from the receiver and LTS based on the representation
8 that the planes were deliverable then. And you just heard an
9 admission that the planes won't be deliverable until sometime
10 next month or the month after that. And that was the basis --

11 THE COURT: No, no, no, no. That's not what I heard.
12 No, no. Their position is that—I hear it. I'm not adopting
13 it. But their position is that they have satisfied the
14 requirement in the contract of a valid FAA airworthiness
15 certificate, and they assert that the experimental certificate
16 under 21-191 is an FAA airworthiness certificate. A point with
17 which you vigorously disagree. I understand.

18 MR. SCHWARTZ: And, of course, they agree that one of
19 the planes doesn't have that.

20 THE COURT: I didn't hear that.

21 MR. SCHWARTZ: It's in the papers.

22 THE COURT: Okay. All right.

23 MR. STOCKHAUSEN: Your Honor, I could explain that
24 point.

25 THE COURT: Yes.

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1 MR. STOCKHAUSEN: It's true that one of them doesn't
2 have that because that's something we're supposed to provide
3 upon delivery. The experimental-category airworthiness
4 certificate could have been obtained in a moment's notice at
5 any time because the third aircraft is airworthy, but there was
6 no point in applying for it until we had a scheduled delivery
7 date because they expire and we'd just have to do it again.
8 And Basler had already earlier applied for those as to the
9 first two aircraft, and they had them and they expired and they
10 reapplied and it expired. And they just didn't want to start
11 that process unnecessarily with the third aircraft because
12 Theia was in receivership by the time the third aircraft was
13 complete. There was no point in applying for it.

14 They were planning to apply to comply with the
15 obligations upon delivery as soon as the parties agreed on the
16 delivery date. CogniSphere declined to take delivery of the
17 aircraft with experimental-category airworthiness certificate,
18 and so we're waiting to schedule a delivery date after getting
19 the standard-category ones that they desire. That's why the
20 scheduling is the case, and that's why there's not
21 airworthiness certificate on the third aircraft yet because it
22 hasn't been delivered yet. It was --

23 THE COURT: Okay. I've heard enough. I've heard
24 enough of that. The fact of the matter though is you say, and
25 I hear you. You are here because your client was defrauded in

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1 connection with entering into an agreement that was premised on
2 an order to be entered by the Court. You say that. That's why
3 you're here. That's why you're not Ricoh copier. That's why
4 you are different.

5 Yet, you do not dispute in this proceeding today that
6 a representative of your client or its predecessor in interest
7 knew on June 10 that there were no standard certificates of
8 airworthiness. And I've learned that that circumstance was
9 knowable.

10 MR. SCHWARTZ: So --

11 THE COURT: Before that even.

12 MR. SCHWARTZ: The June 10 --

13 THE COURT: And therefore, I get back to my question
14 to you: You're fine with taking delivery of these planes in
15 December if they pass your inspection, if the contract is
16 complied with? If there's an FAA standard certificate of
17 airworthiness as to the two and the conditions are otherwise
18 met, you're fine?

19 MR. SCHWARTZ: If the contracts remain in place,
20 that's what will happen. Yes.

21 THE COURT: All right. And my strong advice to you
22 today is retain good local counsel in Wisconsin. In which
23 county is it?

24 MR. STOCKHAUSEN: Winnebago County, your Honor.

25 THE COURT: Winnebago. You'll love it there. It's

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1 terrific. All right.

2 MR. SCHWARTZ: I --

3 THE COURT: That's where your future lies.

4 MR. SCHWARTZ: I understand that there are disputes
5 between the parties that are contractual and that probably
6 belong in that forum. Again, the reason we came here: June 10
7 was new as of this hearing. And when he said it before, he
8 said it was in the papers, you know, I pride myself on being
9 prepared so I was surprised by that.

10 THE COURT: I understand. I know.

11 MR. SCHWARTZ: So I'm not in a position to contest
12 that because I hadn't heard it before. As I said, we've been
13 forthright from day one, however, that before the final payment
14 was made, we knew. But because of the realities, because the
15 transaction was halfway through --

16 THE COURT: I'm not standing here faulting you for
17 that, for doing what you felt were the economic realities. I
18 don't fault you for that, but you are coming in here claiming
19 fraud.

20 MR. SCHWARTZ: We're coming in here saying that
21 misrepresentations were made to the receiver, to LTS, and to
22 the Court. And, you know, you've presided over enough fraud
23 cases to know that it's not a defense to say you could have
24 done due diligence and discovered the fraud.

25 THE COURT: No. But I do know from enough fraud cases

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1 that it's a fruitful area of intense discovery to find out
2 whether or not there was due diligence done.

3 MR. SCHWARTZ: Sure. But I'm focused on and our
4 application is focused on --

5 THE COURT: And whether a rational business person
6 parted with \$12 million without bothering to check the FAA
7 website.

8 MR. SCHWARTZ: I am focused on and the application is
9 focused on the representations that were made to the Court in
10 connection with Basler's original motion and the stipulation
11 order that resolved that motion. Whatever else happened
12 between the parties, that representation was inaccurate. I
13 understand you are frustrated at this posture, and we're
14 definitely downstream for the reasons that this case was filed
15 in the first instance. But someone came into court and made an
16 application or obtained an order based on a misrepresentation,
17 and I think that matters and I think that belongs here.

18 THE COURT: And do you ask me to vacate the June 11
19 order? Would you like me to vacate it right now?

20 MR. SCHWARTZ: That's the alternative relief we asked
21 for. You have the ability to vacate the order, which will
22 vacate the agreement, which will result, we believe, in Basler
23 having to refund the monies paid by Theia and --

24 THE COURT: And if they don't?

25 MR. SCHWARTZ: Well, I would dispute, I guess.

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1 THE COURT: Where?

2 MR. SCHWARTZ: That's a good question.

3 THE COURT: Well, I asked it. That's why.

4 MR. SCHWARTZ: Yeah. I don't know the answer to that.

5 MR. STOCKHAUSEN: Your Honor, if I could comment on
6 this misrepresentation issue?

7 THE COURT: Sure.

8 MR. STOCKHAUSEN: This is a really critical point.
9 We're being very fast and loose or CogniSphere's counsel is
10 being fast and loose with this, you were defrauded, that a
11 misrepresentation was made to the Court. They conveniently
12 never go back to what that actual misrepresentation was.
13 There's nothing in it about the standard-category airworthiness
14 certificates. There's nothing in about its readiness for
15 immediate delivery. It always, as part of it, was the
16 obligation to date. The delivery date was always in the
17 future, and that was understood by all the parties at the time,
18 that the aircraft -- the delivery had to have happened pursuant
19 to the contract.

20 There's just no representation they can point to the
21 Court that talks about any of the things that they are now
22 claiming are false. They have to pack their understanding of
23 what that would have meant and would have implied in order to
24 get to anything that they can even pretend is a
25 misrepresentation. If we're going to have a fraud case, we've

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1 got to look at the actual representation we're talking about,
2 and it just doesn't say what they keep saying it says.

3 THE COURT: Mr. Schwartz, you want to -- I'm going to
4 give you an opportunity to say anything you want to say on any
5 of the issues pending.

6 MR. SCHWARTZ: There are two representations. There's
7 a representation that was made in the declaration filed with
8 the Court that said that Basler had performed all of its
9 obligations under the agreement. The agreement, the contract.

10 The contract required the planes to be delivered
11 airworthy and with valid FAA airworthiness certificates. The
12 premise of their original motion and of the letter agreement
13 was these planes are ready for delivery but for nonpayment, and
14 so, the letter agreement was a way to remedy the nonpayment.
15 That representation was false because they were not ready for
16 delivery without those airworthiness certificates.
17 Separately—separately—they admit in their papers that Basler
18 made a representation directly to the receiver that the planes
19 were in deliverable condition, which meant that they had
20 airworthiness certificates. It's undisputed that two of them
21 had only experimental certificates. One had none at all. None
22 of them had standard-type certificates, which is what everyone
23 in the universe understood they meant.

24 If you look at their declaration, they admit that at
25 the time of contract formation, they only could have been

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1 talking about standard-type certifications because they hadn't
2 yet even started talking about the modifications that led to
3 them ultimately getting experimental-type certificates. No one
4 was thinking of that at the time of contract formation. The
5 representation that was made to the Court and to the receiver
6 were inaccurate.

7 They obtained court orders that resulted in millions
8 of extra dollars being paid as a result. That ought to be a
9 problem. That ought to be a problem for the Court. That ought
10 to be a problem for the receiver, which is why he put in the
11 declaration, and now it's ultimately my client who was put in a
12 very difficult business situation who bears the brunt of them.
13 So, you know, we're here on that narrow issue, narrow but
14 important issue, seeking relief. And that issue, I think, is
15 properly before this Court. Other issues may be for another
16 court.

17 THE COURT: Thank you. Anything further from Basler's
18 counsel?

19 MR. STOCKHAUSEN: Your Honor, I think we said it all
20 already, and I won't bore you by just repeating things I've
21 already indicated.

22 THE COURT: All right. I'm going to set a conference
23 for January 10, 2025, at 10 a.m. It will be a telephonic
24 conference, and the access number will be as put up in the
25 order of yesterday. I think I put the AT&T access number up

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1 yesterday. It will be the same number unless you hear
2 otherwise.

3 MR. STOCKHAUSEN: Thank you, your Honor.

4 MR. SCHWARTZ: Thank you.

5 THE COURT: Thank you, all, very much.

6 (Adjourned)

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